IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox, Nyarangi JJA & Gachuhi Ag JA

CRIMINAL APPEAL NO. 97 OF 1985

Between

JUSTUS ODOMO MUNYOLE .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of High Court of Kenya at Kakamega, Aganyanya J dated 9th May 1984

In

Criminal Appeal No. 319 0f 1985)

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JUDGMENT OF THE COURT

The appellant, Justus Odomo Munyole, and six others were jointly arraigned on four counts of robbery with violence contrary to section 296 (1) of the Penal Code, the allegation under each count being that on the 15th day of April, 1983, at Muluanda areas of Kisa Location, Kakamega District, the appellant together with six others jointly with others not before court on the material day robbed with violence the four complainants, that is to say, Phibi Amukhuma (count one), Samuel Juma (count two), Zadock Andanje (count three) and Joseph Amoni (count four) of various household articles particularized under each of the four counts.

The appellant was found guilty and convicted of the offences in counts 1,2 and 4 and sentenced to 7 years' imprisonment, the sentences to be served concurrently, plus five strokes corporal punishment and ordered to be subjected to a reporting order for a period of 5 years after release. His appeal to the High Court (Aganyanga J) was allowed to the extent that the convictions under counts 2 and 4 were quashed, the number of strokes reduced to 4 but the sentence of 7 years' imprisonment was upheld. There was in addition one count of attempted robber with violence, and three of handling stolen property against other accused persons but these do not concern us on this appeal.

This appellant's second appeal, which should only raise issues of law, is on grounds which we will summarise as follows: No cautionary statement was recorded from him, that having reported to the police station, his house should have been searched for stolen property, the statement of Ndunga (co-acccused) should not have been admitted by the lower courts, that the evidence of Phibi (PW 1) was as a result of grudge going back to the time he divorced her daughter and demanded return of the dowry, that no other

accused person connected him with the offences, that the burden was shifted to him to prove his innocence, and that Phibi could not have identified him. Before us the appellant adopted the grounds in his main and supplementary petitions of appeal and added that during the trial Phibi had alleged that he had bewitched her daughter and rendered her barren and that police officers concerned with the case at the Yala Police Station were not called to testify at the trial.

On behalf of the Republic, Mr Bwonwonga learned Principal Provincial State Counsel, who appeared with Mr Timosi, Learned State Counsel, informed the court that they did not support the convictions for the reasons first, that Patrick Andunga who was a co-accused was not asked whether or not he objected to his charge and caution statement recorded on April 18, 1983, wherein he stated that he, the appellant and several others went to the house of Phibi on April 16, 1983, and robbed her of her household property. This was taken into account against the appellant by the judge without ascertaining form Patrick Ndunga if he objected to the statement, and secondly that the lower courts did not separately deal with the evidence against each accused or appellant. The prosecution, having elected to charge seven accused, who included the appellant, jointly under the several counts, should have led evidence to prove which accused was found in possession of the material household articles, or some of them and to which complainant such articles belonged. As example of the confusion caused by the prosecution evidence, we refer to the evidence of Cpl Ekesa (PW 5) who together with three other police officers proceeded to the house of Recho Amwayi, who was accused number 5. Cpl Ekesa went on to tell the Senior Resident Magistrate that:

> "Many recovered properties, amongst them were two mattresses (sponge) one red white striped shirt, one coloured dress, a kettle, a glass, a mug, two tea cup,, a knife, 3 spoons, 2 plates and accused 5 led us to a sugar plantation. Where we recovered 2 suit cases containing clothes ..."

When he was cross-examined by the appellant, Cpl Ekesa answered, *inter alia*,

> "Nothing of the recovered property was found in your house or with you"

Anyanga, the sub-chief of Muluanda area, who went to the scene of the robberies, told the magistrate that he found no stolen property in the appellant's house. The magistrate and the judge omitted to analyse the evidence on the basis we have mentioned above and, consequently, failed to make findings of fact as to whether the appellant was found with any, and if so, with which, of the material household articles. That was an error of law which prejudiced the case of the appellant, whose defence was that he did no take part in the series of robberies.

The other question involved in his appeal is as to the charge and cautionary statement of Patrick Andunga, who was co-accused number one and whose defence was that he did not mention anybody's names in this case. The appellant ended his unsworn statement thus,

> "I am surprised to be charged with strangers."

Notwithstanding the denial in Court by Andunga that he did not mention the appellant, the judge held that the evidence of Phibi that she identified the appellant in her house was supported by the charge and cautionary statement of Andunga, though he correctly appreciated that such evidence if admissible, could be of no more value than to be taken into consideration as against a co-accused. See section 32 of the Evidence Act Cap 80.

However, Andunga was never given the opportunity to object to this statement. Even if admissible, the statement could not form the basis of a case against the appellant as a co-accused; but it could supplement evidence which narrowly fell short of proof beyond reasonable doubt. The proper approach was stated in *Gopa and others vs The queen* (1953) 20 EACA 318 as follows:

> "The confession of a co-accused is intended to be used to corroborate and even to supplement the evidence in those exceptional cases in which, without its aid, the other

> evidence falls short by a very narrow margin of that standard of proof which is requisite for a conviction ... there must be a basis of substantial evidence to which a confession or statement may be added. If there is substantial evidence against the accused and there remains some lingering doubt, the confession may be taken into account to set that little doubt at rest."

See also *Muthige s/o Mwigai and Others v Reginam* (1954) 21 EACA 296 at page 268.

The next matter to which we invite attention is that the evidence against each accused was not considered separately by the trial and the High Court. As we have indicated, the lower courts failed to separate the numerous household goods and relate the articles to particular charges one to each accused person. It is so well established, as to make it unnecessary to cite decided cases, that in a joint trial involving more than one accused person the evidence against each accused must be considered separately, and the case against each must be such as to prove the guilt of that particular accused beyond reasonable doubt. It is also a misdirection to deal separately with one part of the evidence and omit to relate it to the whole as the judge appears to have done.

The more we look at the prosecution evidence, the plainer it becomes, we think, that the failure to connect the appellant specifically with any of the property which was recovered by police officers following the series of violent robberies, and the failure by the lower courts to consider the evidence against each accused separately so weakened the case that it is impossible to say that the statement of Patrick Ndunga the co-accused, was not in fact used to bolster up the conviction of the appellant in a case which would not stand on its own. The evidence of Phibi on identification suffers from the drawback that the conditions for positive identification were almost nil. She was alone in her house when she was attacked by a gang of many persons. Her son Samuel (PW 2) who was dragged out of his house and taken to his mother's house and placed under a bed, peeped and saw through torchlight, Patrick Ndunga and Shitere but he did not see the appellant.

In these circumstances this Court has come to the conclusion that the only safe course is to allow the appeal, quash the conviction, set aside the sentences and order that the appellant shall be set at liberty unless he is otherwise lawfully held.

We have considered the possibility of ordering a retrial on the principles of the decisions in *Ahamed Ali Sumar v Republic* [1964] EA 481, *Horace Kiti Makupe v Republic* Criminal Appeal No 93 of 1983 (unreported) *Mohamed Rafiq v Republic* Criminal Appeal No 56 of 1983 (unreported) and *Bassan v p* [1960] EA 854 at page 867 it being our view that had the case been properly prosecuted and admissible evidence adduced, a conviction might fairly be said to have resulted. We feel however, that it would not be possible at this late stage for the prosecution to marshal their witnesses and exhibits so as to prosecute the case fairly and with any reasonable prospect of success. Furthermore, the appellant might be prejudiced in his defence if a retrial were to be held. For these reason, we have decided not to order a retrial.

Dated and delivered at Kisumu this 5th day of December , 1985.

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

J.M GACHUHI

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Ag.JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR